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## Intellectual Property in the Digital Streaming Age: How Music Becomes a Lawsuit

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Intellectual Property in the Digital Streaming Age:  
How Music Becomes a Lawsuit

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## Abstract

A mix of both entertainment business and law, the purpose of this review is to address the question of “are current copyright laws and procedures too restrictive of new and smaller-name artists from entering the market?” Through a law review and analysis of the history of copyright law, this thesis outlines the issues new, smaller music artists face as a result of rapid digital evolution paired with a slow-moving legal system. Failing to amend the current standards for dealing with old copyright cases will cause further issues with the growing popularity of digital platforms like YouTube, Soundcloud, Spotify, and TikTok. The recommendations are suggestions based on an analysis of previous problems and the subsequent reactions to these decisions.

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# Introduction

## Current Problem

I began posting videos of myself singing to karaoke tracks in 2013. At the time, I just turned 14 years old and had a very small following - 100 subscribers. As my following began to grow, I started receiving copyright notices from YouTube, sometimes years after my videos were published, and was confused why other people's covers of the same song were allowed to stay on site. A few months later, some DJs began using my vocals and remixing them, but somehow, I would get copyright infringement notices as if I was the one infringing on their remix that used my vocals. I never monetized any of my videos, because I always felt that you should only be able to monetize truly original content, which added to my confusion over why big-name companies like Disney and Sony Music were sending me notices. Out of all the copyright infringement issues, why go after something so minute?

This issue is one that many artists have been having issues with for years, due to YouTube's Content ID System, which is supposed to help identify if music has been stolen from the true owner. In 2018, a Dutch YouTuber, Paul Davids, had a similar problem, where he would use his platform to replay famous guitar riffs and teach others how to do them. He received a copyright infringement notice from YouTube after another artist used his guitar playing as part of the instrumental track for the cover this YouTuber was making. Instead of issuing the second person a notice, Davids was the one issued a notice for his own material. YouTube's Content ID System even prevented Justin Bieber from posting his video for "Pray," thinking it was infringement.<sup>1</sup> Sometimes, copyright infringement is extremely technical, requiring

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<sup>1</sup> Tom Gerken, YouTuber in row over copyright infringement of his own song BBC News (2018), <https://www.bbc.com/news/technology-44726296> (last visited Nov 16, 2020).

musicologists' and experts' input, but if humans have trouble drawing the line between what constitutes infringement and what does not, AI Content ID programs can further limit market entry where it should not be restricted. When I posted videos, I received infringement notices for having 1,000 views on average per video - unable to monetize my videos even if I wanted to. However, if a larger artist were to post a cover video, like Miley Cyrus, this should be much more problematic because she has a humongous audience reach. It is these big names that should be at the center of infringement claims, not small-name artists who serve as no economic threat.

## Background

### Understanding the Music Publishing Business

The music industry can be broken down into three main businesses: music publication, recording, and live performance. For centuries, music was traditionally passed down through live performance. What has now become an industry within the overarching music business, was once in fact *the* music business. From ancient theaters to modern-day concert halls, the live performance industry is the most profitable portion of the music business. According to a 2019 Forbes Magazine report, 75% of performers' income was generated through live events, concerts, shows, and tours.<sup>2</sup> The recording industry plays an instrumental part in the music industry as well, housing record labels and recording studios, but ultimately, live performance is the main way performers make money.

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<sup>2</sup> Oisín Lunny, Record Breaking Revenues In The Music Business, But Are Musicians Getting A Raw Deal? Forbes (2019), <http://www.forbes.com/sites/oisinelunny/2019/05/15/record-breaking-revenues-in-the-music-business-but-are-musicians-getting-a-raw-deal/> (last visited Nov 16, 2020).

Without publishing, performers, producers, and record companies would not be able to monitor the money they are entitled to as creators. A master recording is the original copyright to a sound recording, which can be owned by an individual artist, producer, or record company. The publisher is the owner of the composition of the work, which entails the lyrics and melody of a song. In order to obtain a license to use someone's recording or make any derivative work, the master and publisher owners must agree to allow the party to use their music. Without having both a Master Use License and Synchronization License, the song in question may not be used, and the new work may not be created. The role of the publishing industry is to monitor royalties, ensuring that creators are paid for the use of their music. Music publishers control five different types of rights to a song: public performance rights, mechanical rights, synchronization rights, print rights, and digital print rights. Performance Rights Organizations like ASCAP, BMI, and SESAC are in charge of protecting public performance rights by collecting royalties as songs are played on the radio, television, or performed live. Mechanical rights entail a performer's right to reproduce and distribute music. A synchronization license is required for the use of music in a movie, show, or video to ensure the song's creator gives permission and is fairly compensated for the use of their work. And finally, print rights regard physical sheet music and digital print rights allow for sheet music to be opened digitally as PDF files, for example. If any artist wants to distribute or use music, publishing companies must have complete approval of the license before the artist can make any money off the work.<sup>3</sup>

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<sup>3</sup> Brian R. Day, *Collective Management of Music Copyright in the Digital Age: The Online Clearinghouse*, 18 Texas Intellectual Property Law Journal 199–209 (2010), [search.ebscohost.com/login.aspx?direct=true&db=aph&AN=49162501&site=eds-live&scope=site](http://search.ebscohost.com/login.aspx?direct=true&db=aph&AN=49162501&site=eds-live&scope=site) (last visited Nov 16, 2020).

## What is Intellectual Property Law

Music copyrights are intangible assets known as intellectual property, meaning they can't be physically touched or held, but still hold value. Intellectual property exists in the creator's mind, which is why it can be difficult to distinguish who thought of an idea first. Often, contracts establish a 50/50 agreement in publishing ownership to avoid copyrighting each line to the person who wrote it. Copyright is the protection of original works, both published and unpublished so that authors are justly accredited and compensated for their creations- including songs, books, and even movies.<sup>4</sup>

The currently accepted copyright law states that an author will be compensated for the use of their published work throughout their life, along with an additional 70 years after death. This means that a song's "life" is its writer's life plus 70 years, after which the song would be in the public domain and available to be used for free, without the requirement of a license.<sup>5</sup> Through copyright protections, artists who would like to use a snippet of a pre-existing song must research to obtain the necessary licenses to do so; otherwise, they may be subject to a copyright lawsuit.<sup>6</sup>

## Copyright Protection and Federal Application

Copyright exists from the moment of creation in a fixed form and comes from Article I of the United States Constitution. In order to obtain a copyright, the work must be original, fixed in a tangible (physical) form, and a work of authorship. Copyright covers more than just music, it

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<sup>4</sup> United States Copyright Office, Copyright Basics 1–10 (2019).

<sup>5</sup> Peter B. Hirtle, Copyright Term and the Public Domain in the United States Copyright Information Center, <https://copyright.cornell.edu/publicdomain> (last visited Nov 16, 2020).

<sup>6</sup> James Eastman, *Paying the Piper: The Anatomy of a 9th Circuit Music Copyright Infringement Lawsuit*, 36 Review of Litigation 224–226 (2017), <https://search-ebscohost-com.rlib.pace.edu/login.aspx?direct=true&db=edshol&AN=edshol.hein.journals.rol36.8&site=eds-live&scope=site> (last visited Nov 16, 2020).



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also can protect art, literature, and even sculptures, however, copyright covers the *expression* of ideas, and not the ideas themselves. Copyright registration is not required, though there are many benefits of registration. For example, registering for copyright allows disputes to be settled in court, which cannot be done without a registration. Registering for copyright protection also gives people six exclusive rights: reproduction rights, adaptation rights, the right to distribute copies, the right to public performance, the right to publicly display the art (usually for literary and pictorial works), and the right to digital distribution and performance. The reproduction right gives copyright owners the right to make copies of their work. They also have the ultimate say to allow others to create derivative works, essentially adapting the original work. This could be a cover or sample of the work. Going hand-in-hand with the reproduction right, copyright owners also are able to distribute and sell the copies of their work. A copyright holder can perform their work for anyone, anywhere. Someone that wishes to perform another's song in public must obtain permission from the copyright holder to do so. Public display is similar to performance, but applies to physical artwork that is tangible. Finally, the last right is specifically the result of the digital era with advancements in radio and streaming. This right gives copyright holders the ability to have their music streamed or played via air waves.

The US Copyright Office is part of the Library of Congress and issues federal copyright registrations. Applications may be sent in online and if granted, gives owner copyright protection over the work for seventy years after the author's lifespan. For works with multiple authors, copyright lasts for seventy years after the last surviving author's death. Once these seventy years are up, the work falls into the public domain and anyone can use it without obtaining a license for the use.

There are two types of potential copyright infringement: Literal and Non-Literal Copying. Usually, works are infringed on a non-literal basis, which means that the evidence is

circumstantial and up for debate. In the case of Non-Literal Copying, a Substantial Similarity test is performed to determine whether the two pieces are similar enough to constitute copyright infringement. This two-step analysis is known as the ordinary reasonable observer test and focuses on whether an “ordinary reasonable person or lay observer would recognize that the copyrighted work was appropriated by the defendant.” Ultimately, the biggest issue in infringement suits is to see if the original artist suffered economic loss due to the copying or illegal use. In music, the analysis would take into account music theory concepts including chord progressions, key changes, key signatures, lyrical similarities, and time signatures.<sup>7</sup>

## History of Copyright Disputes

Copyright disputes were originally focused on sheet music. Infringement cases would look over printed lyrics and melodies to see if infringement occurred. As more and more technology became readily available and used in the recording industry, infringement cases looked at aspects of digital production instead of sheet music. With time, these copyright disputes have become solely focused on music that sounds like other, pre-existing music, otherwise known as sampling. One of the most famous and highly controversial recent sampling cases is *Williams v. Bridgeport Music Inc.*<sup>8</sup>

### Millett v. Snowden (1844)

The first documented intellectual property music copyright court case arose in *Millett v. Snowden* (1844), over the uncompensated reprinting and selling of sheet music. Snowden, the defendant, was unaware that music he had found in a different newspaper had been copyrighted

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<sup>7</sup> Deborah E. Bouchoux, *The Law of Copyright, in Intellectual property: the law of trademarks, copyrights, patents, and trade secrets* 187–273 (5 ed. 2018).

<sup>8</sup> EASTMAN, *supra* note 6, at 224.

and belonged to Millett, the plaintiff. Snowden additionally argued that the lyrics were rewritten and had no similarities to the original song, “The Cot Beneath the Hill,” despite the actual music being the same. The Court found Snowden guilty, despite being unaware of the copyright and having no intention of infringing it.<sup>9</sup> The court’s decision states,

If a copyright has been invaded, whether the party knew it was copyrighted or not, he is liable to the penalty. As to its being different from the original, in music, as in writing, the omission of a word or line or paragraph could not change it so as to avoid the statute.<sup>10</sup>

Because Millett’s copyright was for music and not words, the mere changing of lyrics did not affect the copyrighted material. Snowden was forced to pay one dollar for each sheet of music sold or printed with the intention to sell, in compliance with the penalty for the copyright music statute. The verdict stated that Snowden was to pay a total of \$625 to Millett, which when adjusted to today’s inflation, is more than \$15,000 in monetary damages.<sup>11</sup>

### Allen v. Walt Disney (1941)

Moving forward in history and technological evolution, as the use of music in film was on the rise, so were music copyright cases regarding the movie industry. In *Allen v. Walt Disney* (1941), Thornton Allen claimed Disney’s song, “Some Day My Prince Will Come,” in Disney’s first fully-animated feature-length movie, “Snow White and the Seven Dwarfs” (1937), had similarity to “Old Eli,” which he owned the copyright for. Like *Millett v. Snowden*, this was a case regarding the musical composition of the piece, and not lyrical. Although Walt Disney was the defendant, due to the circumstance of this case revolving around the movie, the actual author

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<sup>9</sup> Charles Cronin Copyright Infringement Resource (discussing *Millett v. Snowden*) <https://blogs.law.gwu.edu/mcir/case/millett-v-snowden/> (last visited Nov 16, 2020).

<sup>10</sup> *Millet v. Snowden*, 17 F.Cas. 374, No. 9600 (2d Cir. 1844).

<sup>11</sup> CRONIN, *supra* note 9.

of “Someday My Prince Will Come” is Frank Churchill. While both pieces were written in the same key and incorporated the same appoggiatura (an added note in the sequence that is typically not associated with the chord), the rest of the two songs share no similarities. Upon deliberation and musical analysis, the court found Walt Disney not guilty, despite a total of nine identified similarities between the two, and dismissed the case.<sup>12</sup>

### Bright Tunes Music v. Harrisongs Music (1976)

In *Bright Tunes Music v. Harrisongs Music* (1976), George Harrison was sued over his record, “My Sweet Lord” and its similarity to Ronald Mack’s “He’s So Fine.” The copyright to the song “He’s So Fine” was owned by the plaintiff, Bright Tunes Music Corp. With musical analysis, the court found that both songs had the same repetitions of two motif progressions that were not commonly used together in music at the time. Additionally, the distinctive use of the same “re” grace note in between the “la” and “do” in the second musical motif further favored the plaintiff’s case. After deliberation, the court found that even if Harrison had written the musical phrase subconsciously, without realizing it is the same as “He’s So Fine,” he is still guilty of copyright infringement. Under the circumstances that the 1963 billboard charts showed “He’s So Fine” was No. 1 in America and No. 12 in England along with Harrison’s statement that he did know the song, the court could not overlook the facts and ruled in favor of the plaintiff.<sup>13</sup>

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<sup>12</sup> Charles Cronin Copyright Infringement Resource (discussing *Allen v. Walt Disney*) <https://blogs.law.gwu.edu/mcir/case/allen-v-walt-disney/> (last visited Nov 16, 2020).

<sup>13</sup> Charles Cronin Copyright Infringement Resource (discussing *Bright Tunes Music v. Harrisongs Music*) <https://blogs.law.gwu.edu/mcir/case/bright-tunes-music-v-harrisongs-music/> (last visited Nov 16, 2020).

## Modern Intellectual Property Law Cases

### What is “Sampling?”

In more current years, as the music market has shifted to become more digital than ever, music copyright cases mostly center around sampling disputes. While older disputes focused on the physical, sheet music, the current issues focus on sampling, which is,

the practice, among popular musicians in particular, of lifting portions of an existing recording and using this ‘sample’ (usually in a repetitive manner) as a component of a new song. The term is related to a more sophisticated technique used by music technologists to create a digital record of various parameters of a given sound (e.g. of a single pitch sounded on a particular violin) known as a ‘sample’ that can be used in a variety of MIDI playback devices.<sup>14</sup>

There is no doubt that technological advancements have increased both the potential and success of the music industry, but with it, opened the door for even greater copyright issues than before.

It is also important to note that sampling is not the same as an interpolation, which is “when a piece of music is recreated in a new recording and meant to sound exactly the same as the original recording.” A sample can be equated to a “copy and paste” situation of the original music, whereas an interpolation is more of a recreation of it, though both are possible through technological advancements and require a license to be obtained for use.<sup>15</sup>

In the 20<sup>th</sup> century, most copyright infringement claims relied on the use of one phrase or musical progression with an uncanny resemblance to a portion of a different song. Now, songwriters and publishing-rights owners are robbed of their entire works, where artists are

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<sup>14</sup> Charles Cronin Copyright Infringement Resource (discussing *Grand Upright v. Warner Music*) <https://blogs.law.gwu.edu/mcir/case/grand-upright-v-warner/> (last visited Nov 16, 2020).

<sup>15</sup> What Is the Difference Between a Sample and Interpolation?, Help Center, <https://help.songtrust.com/knowledge/what-is-the-difference-between-a-sample-and-interpolation> (last visited Nov 16, 2020).

blatantly stealing a whole verse or chorus, and simply changing the lyrics, without bringing justice to the original musical inspiration.

### Grand Upright v. Warner (1991)

In the 1991 case, *Grand Upright v. Warner* (1991), Biz Markie was sued over his song “Alone Again” and its similarity to Raymond O’Sullivan’s “Alone Again (Naturally).” Despite an almost exact same title, Markie used the whole melody of “Alone Again (Naturally)” and just rapped over it, changing the lyrics and flow. In order to use a portion of another song as Biz Markie did, he needs to get “clearance” to do so from the original authors.

Warner Bros. had a department specifically for obtaining clearances and were well aware of the necessary permissions they needed to have before releasing a sampled song. The main issue the court found was not Markie’s use of the sample, but rather Warner Bros.’ failure to perform their duties to obtain the licenses before “Alone Again” was released.

The final decision found that the defendant, Warner Bros., illegally sampled the plaintiff’s song, “Alone Again (Naturally),” and therefore, found guilty of plagiarism. Because the main goal of Warner Bros. was to make money off Biz Markie’s song, the plaintiff was to be rightfully compensated for all damages that came as a result.<sup>16</sup>

### Williams v. Gaye ( 2018)

A more recent and controversial case was the three-year dispute over “Blurred Lines.” In 2015, Marvin Gaye’s family sued Pharrell Williams and Robin Thicke for rhythmic similarities between the late Gaye’s “Got to Give it Up” and “Blurred Lines.” This case was especially important in the evolution of digital music because it was the first time where a style of music was able to be copyrighted, which could present issues for future sampling lawsuits.<sup>17</sup> At the trial

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<sup>16</sup> CRONIN, *supra* note 14.

<sup>17</sup> Charles Cronin Copyright Infringement Resource (discussing Pharrell Williams, et al. v. Bridgeport Music, et al. Music) <https://blogs.law.gwu.edu/mcir/case/pharrell-williams-et-al-v-frankie-gaye-et-al/> (last visited Nov 16, 2020).

court level, the court found Williams and Thicke guilty of copyright infringement. Upset by the decision and determined to get it overturned, the dynamic duo, whose song led the charts in 2013, took the case to the appellate court. Upon further analysis, the Ninth Circuit Court of Appeals held the trial court's decision and found that the success of "Blurred Lines" was heavily dependent on Gaye's composition, despite being written in a different key and having a different rhythm.<sup>18</sup> In 2015, Music Week surveyed 185 people, where 130 people responded saying the verdict was unfair. 70% of those surveyed disagreed with the outcome finding Thicke and Williams guilty of infringement. One of the Warner/Chappell songwriters, Jim Irvin, who has written popular songs for Lana Del Rey and David Guetta said that the final decision in this case was "clumsy" and "sets a bad precedent." Irvin continued to say, "This decision must have been made by people who don't understand how music's put together. Everyone faced with a blank page will try emulating something they admire, then, as you work, you naturally pull away from the inspiration and create something of your own."<sup>19</sup> Irvin's statement shows the issue with non-musical professionals analyzing high level music theory concepts and the dangers these decisions can have for the future of music copyright law and litigation.

### Spirit v. Led Zeppelin (2016)

After multiple years of dispute and appeal, the Supreme Court has decided not to hear the controversial music copyright case between bands, Led Zeppelin and Spirit, leaving the Ninth Circuit decision as final. In 2016, the trial court that heard the case sided in favor of Led Zeppelin, against copyright infringement of Spirit's song, "Taurus." In March, the court of

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<sup>18</sup> Joseph P. Fishman, *Music as a Matter of Law*, 131 Harvard Law Review 1864 (2018), <https://search-ebscohost-com.rlib.pace.edu/login.aspx?direct=true&db=edshol&AN=edshol.hein.journals.hlr131.85&site=eds-live&scope=site>.

<sup>19</sup> Rhian Jones, *Music Week poll: Blurred lines verdict unfair; 70% of respondents disagree with ruling in Marvin Gaye plagiarism court case*, Music Week 3 (2015), <https://search-ebscohost-com.rlib.pace.edu/login.aspx?direct=true&db=edsggo&AN=edsgcl.436983384&site=eds-live&scope=site> (last visited Nov 16, 2020).

appeals upheld the trial court's decision. This case is a great example of how time-consuming and costly copyright infringement cases may be, as the case was originally filed in 2014. This case is also very significant because the appellate judges said that for music composed prior to 1978, which both "Stairway to Heaven" and "Taurus" were, the only evidence that could be used to access whether infringement took place is the sheet music that was submitted to the US Copyright Office. This excludes the ability to hear the sound recording and analyze it for similarities. Because "Taurus" sheet music was a rough sketch, many of the notes were not included, causing the two sheets to look very different, when a sound recording could have proved otherwise.<sup>20</sup> Like with the Marvin Gaye case, comparing musical qualities like key signature, time signature, and rhythm may not be obvious to a non-professional musician, which further complicates decisions. A side-by-side comparison of the two sheets is shown below.

**Figures 1 and 2** "Taurus"<sup>21</sup> and "Stairway to Heaven"<sup>22</sup> Sheet Music



<sup>20</sup> Ben Sisario, Led Zeppelin Wins Long 'Stairway to Heaven' Copyright Case The New York Times (2020), <https://www.nytimes.com/2020/10/05/arts/music/stairway-to-heaven-led-zeppelin-lawsuit.html> (last visited Nov 16, 2020).

<sup>21</sup> 2020. Image Of "Taurus" Sheet Music. [image] Available at: <<https://www.villanovawreview.com/post/624-a-long-climb-led-zeppelin-s-stairway-to-heaven-prevails-in-copyright-lawsuit>> [Accessed 17 November 2020].

<sup>22</sup> 2020. Image Of "Stairway To Heaven" Sheet Music. [image] Available at: <<https://www.keytarhq.com/stairway-to-heaven-led-zeppelin.html>> [Accessed 17 November 2020].



Music is designed to be heard, not seen. Sound recordings should be allowed as evidence no matter how long ago the recording was made and despite whether or not the sound recording was protected at the time it was copyrighted. Had the Supreme Court taken on this case, they could have potentially allowed for sound recordings to be used as evidence for music prior to 1978, which would help resolve many disputes. Because we have the technology to do so, it is much easier for a non-musical professional and every-day, reasonable person to hear the similarities rather than see them on paper and understand the musical meaning behind it.

### Alternative Dispute Resolutions

While some like Zeppelin, Williams, and Thicke turned to great measures in the United States Court system, alternative dispute resolutions (ADRs) have become more and more popular in an effort to save involved parties of the hassles of going to trial. The most common ADR used to resolve music copyright issues is negotiation, where the alleged copyright infringer states they are guilty, and agrees to settle the dispute by paying the original copyright holder. When the defending party agrees to give credit to the original author which they sampled from, a portion of future revenues from that recording will go to that writer.<sup>23</sup> For example, P. Diddy (then Puff Daddy) sampled Sting's song, "Every Breath You Take" and released it before obtaining the necessary licenses. Puff Daddy renamed the song "I'll Be Missing You," but the underlying music was exactly the same as Sting's composition. Puff Daddy agreed to settle the dispute by giving Sting partial rights to the derivative work, as well as the right to future royalties on the track.<sup>24</sup>

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<sup>23</sup> Glenn Litwak, Music Industry Advice: Alternative Dispute Resolution Music Connection Magazine (2016), <https://www.musicconnection.com/music-industry-advice-alternative-dispute-resolution/> (last visited Nov 16, 2020).

<sup>24</sup> Ryan Book, 'Every Breath You Take' makes Sting almost \$2,000 every day. Music Times (2014), <https://www.musictimes.com/articles/3268/20140108/breath-take-makes-sting-2-000-day.htm> (last visited Nov 16, 2020).

Another famously resolved out-of-court case was for “Ice Ice Baby.” The track closely resembled Queen and David Bowie’s “Under Pressure,” and Vanilla Ice agreed to settle out-of-court. Along with being compensated for the success of “Ice Ice Baby,” the British rock band and Bowie received full rights to the derivative work and are still paid royalties for airplays to this day.<sup>25</sup> The same thing happened to MC Hammer when listed as a copyright infringer of Alonzo Miller’s “Super Freak,” which cost him partial rights on the track and lowered his stream of royalty collection for “U Can’t Touch This.”<sup>26</sup>

## Significance in Today’s World

As someone who struggled with some of these legal provisions at a time when I was posting my own musical material, it became evident that copyright laws were outdated and made it almost impossible for new artists to enter the market. Sadly, while these laws have been updated, they are still not able to be completely up-to-date because of the influence of technology in our world. While technology is constantly changing, our laws are not. In 2018, Congress passed the Music Modernization Act (MMA), which was the first big document to address music copyright issues since the passing of the Digital Millennium Copyright Act (DMCA) in 1998. Twenty years is a tremendous amount of time for laws to remain the same when technology has been evolving so rapidly. Because these laws were untouched for so long, the US Government had no real way of dealing with issues regarding sampling and derivative works that did not make the artist any money for a very long time. The DMCA is also the reason

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<sup>25</sup> Jordan Runtagh, Songs on Trial: 12 Landmark Music Copyright Cases Rolling Stone (2018), <https://www.rollingstone.com/politics/politics-lists/songs-on-trial-12-landmark-music-copyright-cases-166396/vanilla-ice-vs-queen-and-david-bowie-1990-61441/> (last visited Nov 16, 2020).

<sup>26</sup> Kenneth Partridge, 'U Can't Touch This' at 25: Remembering MC Hammer's Breakthrough Single Billboard (2015), <https://www.billboard.com/articles/columns/the-juice/6436624/u-cant-touch-this-25-anniversary-mc-hammer> (last visited Nov 16, 2020).

streaming platforms, like Spotify, Apple Music, and Pandora were able to get away with paying artists next to nothing for their music for so long.<sup>27</sup>

The implementation of the Music Modernization Act helps update certain provisions about royalty payments from streaming services and digital service uses, but these changes are nowhere near the laws we should have in place to protect artists from being exploited, make sure they are fairly compensated for their work, and avoid limiting an artist's creativity. None of these laws have fully taken into account the changing industry, and if we do not change these laws more rapidly, there will soon be no way for new artists to enter the market unless they have the ability to do so completely on their own with 100% original content.

It is evident that globally-known artists, like Ed Sheeran, Katy Perry, Robin Thicke, Pharrell Williams, and Marvin Gaye, are most vulnerable to copyright infringement suits because of their status, but what about the upcoming artists? When the proper legal steps regarding publication rights are taken to ensure fair compensation to publishers and masters owners, artists can sell their works to whomever they want. However, there is a gray area for up-and-coming artists who have no intention of profiting off these works and merely use them as a chance to be heard. With video streaming platforms like YouTube and Vimeo, copyright infringement of music is no longer exclusive to singers and musicians who post material online.

While upcoming singers who post covers of songs to gain popularity and bring viewers to their pages have been targeted for copyright infringement for years, now dancers who post choreography videos, and painters who post art videos are being targeted as well for the use of someone's music in the background of their videos. If we continue moving in this direction, eventually, no dancer will be able to post their work unless they own the rights to the song that

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<sup>27</sup> Stasha Loeza, *Out of Tune: How Public Performance Rights Are Failing to Hit the Right Notes*, 31 Berkeley Technology Law Journal 739 (2016), <https://search-ebscohost-com.rlib.pace.edu/login.aspx?direct=true&db=edshol&AN=edshol.hein.journals.berktech31.24&site=eds-live&scope=site> (last visited Nov 16, 2020).

they are performing to. With the number of digital distribution channels rising in the modern age, the copyright laws of our nation must evolve to be more flexible, allowing for new artists to have the same opportunities older artists had in the pre-digital era.<sup>28</sup> If we can allow a professor to give students free access to a few chapters of someone else's work under the Fair Use Doctrine,<sup>29</sup> or allow exceptions to infringement if the use was minimal parts of it (De Minimis Exemption), we should give new artists, who are not monetizing off of a work, the same protections. The extreme regulation of online content is making it harder and harder for artists to enter the professional world and showcase themselves like older artists did, often performing in open-public spaces to get their names "out" and making some money from these performances of other peoples' works.

With the availability of platforms like YouTube and SoundCloud, many artists joined these sites with no intention of selling their beginning material on their channels. Because of this, many new artists post covers or sample already popular music so that users who search for the original song will also see the derivative work in the search. Studies show that artists that have already gained a following by posting covers and sampling pre-existing songs boosted the original songs' sales. Current laws often challenge these samples to test if they are "fair use," but there is clearly a positive economic impact, and the original artist can benefit greatly when someone covers or samples their song. These derivative works can actually lead to the original artist gaining more exposure and influence others to stream or buy the song, bringing in revenue for the original artist. One example that exemplifies these sales changes is artist Girl Talk's album, *All Day*, which notoriously sampled many well-known hip-hop songs without obtaining a

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<sup>28</sup> *Id.* at 748-749.

<sup>29</sup> Joseph V. Arn, Rebecca Gatlin & William Kordsmeier, *Multimedia Copyright Laws and Guidelines: Take the Test*, 61 Business Communication Quarterly 32-33 (1998), <https://search-ebscohost-com.rlib.pace.edu/login.aspx?direct=true&db=buh&AN=1386075&site=eds-live&scope=site> (last visited Nov 16, 2020).

license.<sup>30</sup> Studies on the effects of the sampled songs show increases in sales of the original music that he referenced by sampling. In the study's results, Schuster reported the findings with 92.5% confidence, writing, "Collecting and comparing sales information for these songs found that - to a 92.5% degree of statistical significance - the copyrighted songs sold better in the year after being sampled relative to the year before."<sup>31</sup> It is interesting to see the effects Girl Talk's album had on the original songs, and these effects should be kept in mind for lawmakers when reviewing future copyright provisions. If Girl Talk wanted to sell these derivative works, he should definitely have to seek and acquire a license to ensure the original artists are compensated a part of his sales for their underlying ideas; however, because the album was available for free download, he should not be penalized. Additionally, should these be on YouTube and not monetized, they would clearly benefit both parties, increasing Girl Talk's popularity while simultaneously increasing sales on the original works. Big record labels and multi-platinum artists often set out to go after smaller names who are featuring and highlighting their works for the \$0.00 revenue they have made off their video. Currently, cover artists must go the extra mile to obtain a license allowing them to recreate a piece and post it digitally, otherwise their video is flagged, and they receive a cease and desist notice until they obtain a license. A third license is necessary if the artist wishes to sell digital copies of the piece or collect streaming revenue from it, which I believe is the only reason someone should have to seek a license - if they want to monetize the work.

As unfortunate as it is to say, multi-platinum artists and their big record companies are abusing their rights and targeting people who are just trying to spread the joy art brings. The exploitation of new artists is completely unfair and disincentivizes artists to post. If copyright

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<sup>30</sup> Girl Talk is the stage name for DJ Gregg Michael Gillis, known for his musical mashups and sampling.

<sup>31</sup> Michael W. Schuster, *Fair Use, Girl Talk, and Digital Sampling: An Empirical Study of Music Sampling's Effect on the Market for Copyrighted Works*, 67 Oklahoma Law Review 444 (2015), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2340235#](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2340235#).

claims continue to target artists who list the name of the song and artist, and do not sell the material, the only artist who will benefit is a writer. Laws should focus on discouraging and penalizing artists that sample without obtaining a proper license and promote a work, for money, as if they were the sole copyright owners. Today's world calls for a reevaluation of the accepted regulations on copyright that do not consider choreography, covers, or any film and video content as completely original works of art, and must evolve with the technology available on branding platforms for tomorrow's artists. How do we define the limitations and regulations of copyright? Are current copyright laws and procedures too restrictive of new and smaller-name artists from entering the market?

## Proposed Solutions

### Legislation Procedure

According to the *Copyright Law of the United States*, The Copyright Act of 1976 “provides the basic framework for the current copyright law.”<sup>32</sup> This statement is extremely problematic because it suggests that current copyright law, which is more than forty years since this act's passing, still relies on this piece of legislation to govern modern copyright disputes. Before the 2018 Music Modernization Act, the United States relied on legislation from twenty years ago to govern copyright disputes. During these twenty years, new companies emerged in recording, distribution, and publishing - all realms of the music industry. Because these laws were left as is, despite these changes, there were, and still are, many loopholes in copyright infringement simply because the laws do not address the technology that enabled these issues. I

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<sup>32</sup> Maria Strong, *in* Copyright law of the United States and related laws contained in Title 17 of the United States Code vii (2020).

believe the reason this legislation was left untouched for so many years is because Congress has many issues to worry about, and updating copyright laws every year is not at the top of their priorities. In order to avoid this, I believe the members of the Grammy Recording Academy should be able to vote once a year whether they would like Congress to revise the current copyright laws. Not only would this expedite Congress' job, it would also allow those directly affected by the laws to have their voice heard.

In addition, I believe the ordinary reasonable observer test should be replaced by a test done by music theory experts. In certain cases, expert testimonies are listened to, while in others, they are looked right over because non-experts may not understand the importance of these seemingly small similarities. The musicologists in the "Blurred Lines" case reported differences in rhythm, key signature, and physical notes, yet, the verdict placed more emphasis on Robin Thicke and Pharrell Williams' words than on an expert's testimony. The often complex aspects of music theory used as evidence of substantial similarity cannot always be left in the hands of a jury that lacks understanding of these characteristics. Because of this, decisions like in "Blurred Lines," are extremely controversial among industry professionals.

An even more recent dispute involved Lizzo and the composition of her hit song, "Truth Hurts." Before releasing the song, Lizzo collaborated with two other writers to write her other song, "Healthy." The two writers, Justin and Jeremiah Raisen, claimed that "Truth Hurts" is substantially similar to "Healthy" and asked to be included in the split distribution of royalties for "Truth Hurts." Lizzo filed a countersuit, saying the brothers should not receive royalty payment. According to a musicologist, there are similarities between the lyrics, piano, and structure of choruses and verses. In August 2020, despite an expert's opinion that there were multiple similarities, the judge granted Lizzo's counterfile and said the two songs are not substantially similar enough to constitute infringement. Though there is some room for the

brothers to file an amended suit, it does not change the fact that those being presented the evidence are not musical professionals and as a result, may not understand how important certain musical characteristics actually are in determining whether infringement has occurred.<sup>33</sup>

## Fair Use Analysis

Fair Use is a common defense against copyright infringement. §107 of the *Copyright Act* codifies fair use and lays out four deciding factors in what constitutes “fair use,” though ultimately, a jury will decide if the use was infringement or fair use. The four criteria are 1) The purpose and character of the use, 2) The nature of the copyrighted work, 3) Amount and substantiality of the portion, and 4) Effect of the use upon the potential market for or value of the copyrighted work (19-20).<sup>34</sup> This four factor analysis is helpful in deciding if there was substantial similarity, looking at whether the use was educational or for-profit, if the material copied was factual or fictional, the amount copied and how important the copied area was, and does the use negatively impact sales of the original. However, it does not really apply to up-and-coming artists posting covers on YouTube or posting videos of themselves dancing. The cost of obtaining mechanical and synchronization licenses becomes a barrier to entry for new artists that are not making money in order to pay for the licenses. Mechanical licenses typically cost between \$14-\$16 per song through companies like Harry Fox Agency Songfile and Easy Song Licenses, which can easily become hundreds for just a few videos.<sup>35</sup>

I believe Fair Use should also be a defense for new artists that have a smaller number of followers and do not profit off of the covers posted. The number of followers allowed comes

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<sup>33</sup> Bruce Haring, Lizzo 'Truth Hurts' Lawsuit Over Song Authorship Dismissed By Federal Judge Deadline (2020), <https://deadline.com/2020/08/lizzo-truth-hurts-lawsuit-over-song-authorship-dismissed-1203014272/> (last visited Nov 16, 2020).

<sup>34</sup> COPYRIGHT LAW OF THE UNITED STATES, *supra* note 32, at 19-20.

<sup>35</sup> Posted by TuneGO, How to Make Song Covers for YouTube Legally TuneGO Music, <https://blog.tunego.com/how-to-make-song-covers-youtube-legally/> (last visited Nov 16, 2020).



directly from YouTube's Monetization Policies, where they are defined. The substance of the factors does not necessarily need to change, but the interpretation should be more open to allow YouTube artists to gain exposure, essentially promoting market entry. According to YouTube's Monetization Policies, in order to be able to monetize a video on YouTube, a user must have at least 1,000 subscribers and generated over 4,000 hours of watch time on their videos in the last twelve months.<sup>36</sup> For artists that do not meet these subscriber requirements and do not sell the cover, I do not believe they should be subject to copyright notices of infringement. Under Fair Use, the use is clearly not-for-profit, fictional material, substantial because it is typically the whole song, and does not take away money from the original song. Should the number of subscribers surpass the minimum, enabling the video to become monetized, then the user should have to obtain a license in order to monetize. However, if the user chooses not to monetize, I believe that the royalties should be paid to the original artists until the cover artist obtains a license.

### Blackbox, Suspense Accounts, and Splits Related Issues

Typically, when a song is written, contributors create and submit a split sheet, "which will determine the percentage of royalties each of [the writers] will receive in the future. Essentially, it is an "agreement that identifies the ownership percentage each producer and songwriter has in the song" and "serves as written evidence of copyright ownership."<sup>37</sup> A split sheet is extremely significant because should there be any dispute within a song's payment of mechanical royalties from streaming, it is easy to take a look at this piece of paper, see exactly who owns what and calculate the correct amount each writer or contributor should receive.

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<sup>36</sup> GERKEN, *supra* note 1.

<sup>37</sup> Henry Schoonmaker, Music Publishing Tips: Split Sheets and Lyric Sheets Songtrust (2018), <https://blog.songtrust.com/understanding-split-sheets-and-lyric-sheets> (last visited Nov 16, 2020).

Without a split sheet, however, this can become a “he said, she said” scenario that leaves a jury to decide who is correct. Many of today’s top popular hits by big artists are written by a team of people. The 2019 Arianna Grande popular song, “7 Rings,” is an interpolation of Rodgers & Hammerstein’s classic song, “My Favorite Things.” According to the BMI Repertoire database, this two-minute and fifty-eight second song has ten composers. Mark Ronson’s hit “Uptown Funk” featuring vocals by Bruno Mars had eleven writers.<sup>38</sup> Technology has enabled these collaborations to happen, but at what price? We look at the names of the other ten individuals and very few ring a bell. It seems like the big-name performing artist is the one achieving success, when there really would be no success without these smaller-name artists behind the scenes. While this may seem unfair, as long as these artists are compensated, it does not really matter at the end of the day.

According to an analysis done by Music Week, out of the Top 100 songs in 2016, only four songs had one writer; one person receiving all 100% of the payment of royalties collected. This means ninety-six songs had multiple composers. Music Week also found that the average number of writers it took to have a Top 100 hit based on this data from 2016, was 4.53 writers. Additionally, the study also found that 13% of these 2016 Top Hits “13% were credited to eight or more songwriters.” These songs include Drake’s “Controlla” and DJ Snake feat. Justin Bieber’s song, “Let Me Love You.”<sup>39</sup> BBC took this information one step further to show that ten years prior to this study, in 2006, the average number of writers on a hit song was 3.52, and going back fourteen years, the top hits were credited solely to one person.<sup>40</sup> These numbers only show that more and more people are getting involved in the songwriting process each year,

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<sup>38</sup> BMI Repertoire, BMI, <https://repertoire.bmi.com/DetailView.aspx?detail=titleid> (last visited Nov 16, 2020).

<sup>39</sup> Mark Sutherland, Songwriting: Why it takes more than two to make a hit nowadays Music Week (2017), <https://www.musicweek.com/publishing/read/songwriting-why-it-takes-more-than-two-to-make-a-hit-nowadays/068478> (last visited Nov 16, 2020).

<sup>40</sup> Mark Savage, How many people does it take to write a hit song? BBC News (2017), <https://www.bbc.com/news/entertainment-arts-39934986> (last visited Nov 16, 2020).

which means that as the number of writers involved increases, the chances of split disputes and unclaimed royalties increase as well. If all writers obtain an even split that is written out and kept on file, any discrepancies can easily be resolved. But, what happens to the in-house writers who don't have big name recognition and own a minute percentage of these songs? Are they protected less because their names aren't Arianna Grande, Drake, or Justin Bieber?

§102 (f) of *Copyright Law of the United States* discusses unclaimed works, but does not say exactly what happens to these works. The 2018 passed law states, “the mechanical licensing collective shall carefully consider, and give substantial weight to, the recommendations submitted by the Register of Copyrights... when establishing the procedures of the collective.” when dealing with unclaimed works.<sup>41</sup> All this means is that they must take into account what is recommended, but the law itself does not give many guidelines, which I believe it should. Currently, when there are split disputes on a song, the “unclaimed” part is the total percentage that is missing attribution to a writer. When PROs attempt to pay out the correct people for their corresponding royalties, if a work is unclaimed, whether this is 2% or 40%, the PRO does not know who to give this money to, so it becomes a conflict, and sits in a suspense account or “Blackbox.” This account ultimately holds the money from these unclaimed works for two to three years, before redistributing it to major music companies, which can be problematic in multiple ways.<sup>42</sup>

One issue that arises because of this two-or-three-year time limit is that often, lawsuits take much longer than two or three years. Alternative Dispute Resolutions would be a more time-efficient alternative, but it can still be difficult to prove who wrote what and each writer's percentage of contribution to the overall work without it being defined by the split sheet. Should

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<sup>41</sup> COPYRIGHT LAW OF THE UNITED STATES, *supra* note 32, at 384.

<sup>42</sup> Henry Schoonmaker, Music Publishing Tips: Understanding Unclaimed Royalties Songtrust (2018), <https://blog.songtrust.com/unclaimed-unallocated-and-black-box-royalties> (last visited Nov 16, 2020).

a writer want to take another writer to court to resolve this split issue, if the case is not decided within the timeframe, the money is lost forever and neither party gets it. An additional issue is that the big-names, whether they are artists or labels, win either-way because the money goes back to them, while the smaller artists and writers lose at the two-three year time period.

## Conclusion

The current legal system dealing with music copyright has a few shortcomings that are extremely harmful to artists in this day and age. While copyright intends to protect the author and give public access to art, these laws are doing just the opposite by being overly restrictive with current digital capabilities in use. Hearing cases, aside from being extremely costly, is time consuming and leaves decisions with juries and judges that are not necessarily musicologists and experts on music theory. If 70% of musical experts surveyed disagree with the outcome of a trial,<sup>43</sup> this should incentivize the government to allow those who are directly affected by the laws and decisions to have a say in them. To address these shortcomings in the legal setting of resolving music copyright disputes and simplify the process, I recommend that platforms like YouTube have special blanket licenses from publishers that you can have access to through a premium YouTube account, instead of paying an average of \$15 for each song. These accounts should only be available for users that meet YouTube's monetization policy, having over 1,000 subscribers and 4,000 hours of watched content. To avoid the associated costs for smaller, new artists, this exception to current copyright laws should be added if impact is de minimis, enabling users to post their videos without receiving notices, if they do not meet the monetization requirements. Using these same monetization guidelines, I recommend that we loosen

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<sup>43</sup> JONES, *supra* note 19.

restrictions and allow new artists to use the Fair Use defense if they do not exceed the subscriber count and have the minimum numbers of hours watched on their videos. Artists that are unable to monetize the video/music and do not have a large following should automatically not be held accountable for infringement, because the impact it has is de minimis. Should there be an instance where there is an over-night, viral video, then the artist may get an infringement notice asking them to obtain permission and pay for a license within one month. If the artist fails to comply and obtain a license, I recommend all the royalties earned go to the original artist. However, if the derivative artist asks and obtains a license within this time, I recommend that they are entitled to royalties for their sound recording, while also having to pay the original composer for use of the composition. Solving the dispute this way would be much more time and cost-effective than waiting for a court to resolve the issue. I also recommend that because music is something we hear, sound recordings and live performances should automatically be allowed as evidence for/against copyright infringement. Additionally, I recommend all funds stay in the “Blackbox” or unclaimed works suspense accounts until they are rightfully claimed. Finally, I recommend that musicologists and music experts have a larger say in the outcome of music copyright disputes. These are the people who can identify similarities (and differences) in infringement claims that are sometimes so technical, that you need to have trained ears to be able to pick up on.

By beginning to address these problems, we can ensure that we reallocate focus on the more pressing copyright issues, while removing certain barriers to entry for new artists. In this digital age where virtual “stealing” can be done so easily, we need to redefine the limitations of copyright so that we truly focus on the artist and ensure that they are able to benefit from the laws, not higher-ups that take advantage of and exploit lesser-known artists. With new platforms like TikTok gaining popularity, even these changes that we make now cannot predict what is to

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come a year down the line, but we cannot allow the laws to be untouched for another twenty years with the current, rapid rate that technology in the entertainment and media industries is advancing at.

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